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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RORY CUIELLETTE,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,

Defendant and Appellant.

B203820

(Los Angeles County
Super. Ct. No. BC311647)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul Gutman, Judge. Reversed and remanded.

Robert E. Racine, Irving Meyer for Plaintiff and Respondent.

Rockard J. Delgadillo, City Attorney, Paul L. Winnemore, Deputy City Attorney for Defendant and Appellant.

INTRODUCTION

Defendant and appellant the City of Los Angeles (defendant) appeals from a judgment of \$1,571,500 in favor of plaintiff and respondent Rory Cuiellette (plaintiff), a Los Angeles Police Department Officer, on his claim of disability discrimination under the Fair Employment and Housing Act, Government Code section 12900, et seq.

(FEHA).¹ On appeal, defendant contends that the trial court erred when it granted certain of plaintiff's motions in limine because the effect of the grant was to resolve the issue of liability in plaintiff's favor; when it gave a jury instruction and verdict form that failed to require a finding of liability, thus leaving damages as the only issue for the jury; and when it denied a new trial motion. We hold that the trial court erred in failing to instruct the jury that plaintiff had the burden of proving that he was able to perform the job of a police officer with or without reasonable accommodation, and therefore reverse the judgment.²

BACKGROUND

Plaintiff brought an action alleging disability discrimination under section 12940, subdivision (a) of the FEHA and for wrongful termination in violation of public policy. Defendant moved for summary judgment on the grounds that plaintiff was judicially estopped from asserting a disability discrimination claim as the result of the position he had taken in a prior workers' compensation proceeding; that plaintiff failed to establish a prima facie case of disability discrimination because he was not qualified for the job and because defendant had a non-pretextual reason for the adverse employment action taken; and plaintiff could not establish wrongful termination because he had not been discharged from employment. The trial court granted defendant's motion and plaintiff appealed.

¹ All statutory citations are to the Government Code unless otherwise noted.

² Because we reverse the judgment on the ground of instructional error, we do not address defendant's contentions concerning plaintiff's motions in limine, the verdict form, or defendant's new trial motion.

On appeal, we reversed the trial court's grant of summary judgment. We held that, upon the facts presented in connection with the summary judgment motion, the doctrine of judicial estoppel did not, as a matter of law, bar plaintiff from pursuing his FEHA claim. We also held that plaintiff's 100 percent total permanent disability rating was not, as a matter of law a legitimate, nondiscriminatory reason for defendant's adverse employment action. Although we noted in our opinion that plaintiff had sustained his initial burden of establishing a prima facie case of disability discrimination – *in connection with the summary judgment motion*, we did not hold that plaintiff was relieved of his burden of *proving at trial*, in connection with his prima facie case, that he was able to perform the essential duties of a police officer with or without reasonable accommodation. With respect to defendant's ability to perform the essential duties of a police officer with or without reasonable accommodation, we stated in our opinion that "the only evidence concerning plaintiff's job functions was a listing of the administrative tasks plaintiff fulfilled when he returned to work after his injury. Absent any evidence to the contrary, we cannot conclude that, as a matter of law, plaintiff was unable to fulfill the essential duties of the job he sought."

Prior to trial on remand, plaintiff filed motions in limine to exclude evidence concerning: (1) "Evidence that defendant had 'a legitimate nondiscriminatory reason for defendant's adverse employment action,'" (2) "Income or benefits received from Workers' Compensation and other Collateral Sources," (3) "Plaintiff's claims being barred by the exclusivity of Worker's Compensation, or any mention of Worker's Compensation determinations," (4) "Defendant, City of Los Angeles ('COLA's) 'efforts to provide a reasonable accommodation' or any type of 'reasonable accommodations' allegedly made by COLA concerning Cuiellette's disability," and (5) "Other employees of the Los Angeles Police Department who were 100% totally and permanently disabled and who have never been provided accommodations." The trial court held a hearing under Evidence Code section 402 as to the first motion in limine and granted the motions.

At trial, as a result of the trial court's decisions on the in limine motions, the parties dealt primarily with the issue of damages. Plaintiff did, however, testify that he

was employed as a Los Angeles Police Department Officer in the fugitive warrant section of the detective support division. In August 1998, plaintiff went on workers' compensation medical leave due to a hernia, high blood pressure, and diabetes. Plaintiff returned to work on May 27, 2003, after his doctor cleared him for "Light duty and administrative work only, no field patrol." Plaintiff testified that one week later, on June 4, 2003, a lieutenant told plaintiff that he was doing a great job but that he had to be sent home because he "wasn't 100 percent," and that he could not return.

Over defendant's objection, the trial court instructed the jury with a "Special Instruction in lieu of CACI 2541 (Reasonable Accommodation)" that provided:

"From 1984 through 1998, Plaintiff Rory Cuiellette worked as a Los Angeles Police Officer for the Defendant, City of Los Angeles. He developed medical problems related to work. Upon his return to work in 2003, he was assigned to a modified desk job, but only for several days. The City of Los Angeles claimed he could not work at the Los Angeles Police Department due to a ruling by the Workers' Compensation Board. Subsequently he attempted to get back to work and the City of Los Angeles agreed to his return commencing in May 2007.

"The Court has already determined, and ruled that the defendant, the City of Los Angeles' reliance on the workers' compensation decision was legally wrong, and therefore the Court found Plaintiff's permanent disability determination was not, as a matter of law, a legitimate, nondiscriminatory reason for defendant's employment action in failing to accommodate Officer Cuillette [*sic*] because of his disability.

"For the purposes of this trial, Defendant agrees that Officer Cuiellette is entitled to some damages, and if so, the amount of damages. However, the City of Los Angeles disputes the amount of damages he sustained."

In the special verdict form, the jury was asked, "Was CITY OF LOS ANGELES's failure to provide reasonable accommodation and/or engage in the interactive process a substantial factor in causing harm to RORY CUIELLETTE?" Having answered that question in the affirmative, the jury was asked to award damages. The jury awarded a total of \$1,571,500, which sum included damages for past economic loss including lost

earnings (\$313,205), medical insurance coverage (\$46,988), and moving expenses (\$11,307); damages for past noneconomic loss, including mental suffering (\$1,000,000); and damages for future noneconomic loss, including mental suffering (\$200,000).

Defendant moved for a new trial and for judgment notwithstanding the jury's verdict. The trial court denied defendant's motions.

DISCUSSION

Defendant contends that the trial court erred in failing to instruct the jury that plaintiff had the burden of proving he was able to perform the essential functions of the job of police officer with or without reasonable accommodation. Defendant requested the jury to instruct with CACI 2541.³ Instead, the trial court instructed the jury with a "Special Instruction in lieu of CACI 2541" that, defendant contends, omitted reference to

³ CACI 2541 would have provided:

"Rory Cuiellette claims that City of Los Angeles failed to reasonably accommodate his medical restrictions. To establish this claim, Rory Cuiellette must prove all of the following:

- "1. That City of Los Angeles was an employer;
- "2. That Rory Cuiellette was an employee of City of Los Angeles;
- "3. That Rory Cuiellette had medical restrictions that limited his ability to work;
- "4. That City of Los Angeles knew of Rory Cuiellette's medical restrictions;
- "5. That City of Los Angeles failed to provide reasonable accommodation for Rory Cuiellette's medical restrictions on June 3, 2003;
- "6. That Rory Cuiellette was harmed;
- "7. That City of Los Angeles' failure to provide reasonable accommodation was a substantial factor in causing Rory Cuiellette's harm."

plaintiff's burden of proof, told the jury that defendant admitted that plaintiff was entitled to damages and, thus, left the award of damages as the only issue for the jury.⁴

Under the FEHA, it is unlawful for an employer to discriminate against an employee because of the employee's physical disability. (§ 12940, subd. (a); *Green v. State of California* (2007) 42 Cal.4th 254, 262 (*Green*).) Section 12940 specifically limits the reach of this proscription, however, "excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties: 'This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.' (§ 12940, subd. (a)(1).)" (*Green, supra*, 42 Cal.4th at p. 262.)

Section 12940 does not classify all distinctions employers make on the basis of physical disability as unlawful discrimination. (*Green, supra*, 42 Cal.4th at p. 262.)

⁴ The Special Instruction in lieu of CACI 2541 provided:

"From 1984 through 1998, Plaintiff Rory Cuiellette worked as a Los Angeles Police Officer for the Defendant, City of Los Angeles. He developed medical problems related to work. Upon his return to work in 2003, he was assigned to a modified desk job, but only for several days. The City of Los Angeles claimed he could not work at the Los Angeles Police Department due to a ruling by the Workers' Compensation Board. Subsequently he attempted to get back to work and the City of Los Angeles agreed to his return commencing in May 2007.

"The Court has already determined, and ruled that the defendant, the City of Los Angeles' reliance on the workers' compensation decision was legally wrong, and therefore the Court found Plaintiff's permanent disability determination was not, as a matter of law, a legitimate, nondiscriminatory reason for defendant's employment action in failing to accommodate Officer Cuillette [*sic*] because of his disability.

"For the purposes of this trial, Defendant agrees that Officer Cuiellette is entitled to some damages, and if so, the amount of damages. However, the City of Los Angeles disputes the amount of damages he sustained."

Instead, such distinctions are prohibited “*only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. Therefore, in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.” (*Ibid.*)

A shifting burden of proof applies to claims of disability discrimination. The plaintiff bears the initial burden of establishing a prima facie case of discrimination by proving that he or she (1) suffered from a disability or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations; and (3) was subjected to an adverse employment action because of the disability. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254.) If the plaintiff meets this burden, the employer must offer a legitimate, nondiscriminatory reason for the adverse employment action. “[L]egitimate’ reasons [citation] in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of discrimination.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358.) Thereafter, the plaintiff bears the burden of proving the employer’s proffered reason was pretextual. (*Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 129.)

In *Green, supra*, 42 Cal.4th at page 258, Green, a stationary engineer at a state prison, was diagnosed with hepatitis C in 1990. In 1997, Green began receiving treatment for his condition with the drug interferon. (*Ibid.*) That treatment left Green fatigued, and caused him to have trouble sleeping and to suffer headaches and body aches. (*Ibid.*) In February 1997, Green’s doctor sent Green’s supervisor a letter requesting that Green be assigned light duty until May or June of 1997. (*Ibid.*) Green’s supervisor made the requested accommodation. (*Ibid.*)

In June 1999, Green injured his back and was placed on light duty on the recommendation of his doctor. (*Green, supra*, 42 Cal.4th at pp. 258-259.) Green’s employer had a policy that employees could be on light duty only for a limited time. (*Id.* at p. 259.) Because Green’s back injury continued to limit him to light duty into

November 1999, Green's employer placed him on disability leave. (*Ibid.*) On July 3, 2000, Green returned to work cleared for full duty. (*Ibid.*)

At the time Green returned to work, Kristi Hilliker, the return-to-work-coordinator for Green's employer, reviewed Green's file and noticed a 1997 doctor's report that the workers' compensation's qualified medical examiner prepared at the time Green began receiving interferon injections. (*Green, supra*, 42 Cal.4th at p. 259.) The report recommended light duty only for Green. (*Ibid.*) Based on work restrictions in that report, Hilliker determined that Green should not have been cleared for full duty and so informed Green. (*Ibid.*) After discussing with his employer various options, Green initially decided to take disability retirement. (*Ibid.*)

In October 2000, Green received a letter from Hilliker informing him that he could not return to work as a stationary engineer unless he could be cleared for full duty. (*Green, supra*, 42 Cal.4th at p. 259.) The next month, Green sought to return to work. (*Ibid.*) Hilliker denied Green's request based on the 1999 finding of a workers' compensation proceeding that found that Green had suffered a work-related injury. (*Ibid.*) Thereafter, Green filed an action alleging disability discrimination. (*Ibid.*)

A jury returned a verdict in Green's favor. (*Green, supra*, 42 Cal.4th 259.) Among other issues on appeal, Green's employer argued that the trial court erred in failing to instruct the jury on the elements of a FEHA claim and the defenses. (*Id.* at pp. 259-260.) In affirming the judgment, the Court of Appeal recognized that the trial court "never instructed the jury on the element of qualification or inability to perform," but held that the FEHA "does not require plaintiff to prove that he is a qualified individual. Rather, the burden is on defendant to establish that plaintiff is incapable of performing his essential duties with reasonable accommodation.'" (*Id.* at p. 260.) Rejecting the Court of Appeal's formulation of the burden of proof in a disability discrimination action under the FEHA, the Supreme Court reversed the verdict in Green's favor, holding that "the Legislature has placed the burden on a plaintiff to show that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation)." (*Ibid.*)

The Supreme Court stated that a plaintiff who alleges disability discrimination as a basis for recovery is required to prove each element of a claim for a violation of the FEHA, including the element that the defendant impermissibly discriminated because the plaintiff was able to do the job with or without reasonable accommodation. (*Green, supra*, 42 Cal.4th at p. 263.) Thus, “in disability discrimination actions, the plaintiff has not shown the defendant has done anything wrong until the plaintiff can show he or she was able to do the job with or without reasonable accommodation.” (*Id.* at p. 265.) A trial court should instruct the jury that “a plaintiff must demonstrate that he or she was qualified for the position sought or held in the sense that he or she is able to perform the essential duties of the position with or without reasonable accommodation.” (*Id.* at p. 267.)

Having found that the trial court erred when it failed to instruct the jury on Green’s burden of proof, the Supreme Court addressed prejudice resulting from the error. The Supreme Court stated, “[i]nstructional error in a civil case is prejudicial “where it seems probable” that the error “prejudicially affected the verdict.”” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].) The jury here was never instructed that plaintiff must prove that he was able to perform the job’s essential duties. For this reason, defendant was prejudiced by the failure to so instruct, and we believe defendant is entitled to a new trial, with proper instructions, unless the evidence shows as a matter of law that plaintiff cannot meet his burden.” (*Green, supra*, 42 Cal.4th at pp. 266-267.)

Plaintiff’s ability to demonstrate that he could perform the essential duties of a police officer was an issue in this case. In its answer, defendant asserted as an affirmative defense that, “Plaintiff cannot recover damages from the Defendant by reason of disability discrimination because of plaintiff’s inability to perform the essential functions of the job with reasonable accommodations.” In opposition to plaintiff’s motions in limine, defense counsel argued that “[o]ne of the issues before the court that this court and the trial will have to address is whether or not [plaintiff] performed the essential functions of his job with or without reasonable accommodations. Medical

records and opinions of doctors will indicate that [plaintiff] cannot perform the essential functions of a police officer.”

Defendant asserts that the trial court had a duty to instruct the jury that plaintiff had the burden of proving that he was able to perform the essential duties of a police officer and argues that “The City requested CACI 2541, a standardized jury instruction for a FEHA disability discrimination claim of failure to provide reasonable accommodation that included the essential elements of liability for such a claim.” At trial, defendant requested the trial court to instruct with CACI 2541 (1 Judicial Council of California Civil Jury Instructions (2007 ed.) p. 137 (CACI))—which has not been modified since 2007 (see 1 Judicial Council of California Civil Jury Instructions (2009 ed.) p. 1438)—and objected to the “Special Instruction in lieu of CACI 2541.” The unmodified version of CACI 2541 does not, however, address the plaintiff’s burden of showing the ability to do the job with or without reasonable accommodation, even though the directions for use of CACI 2541 in 2008 and 2009 cite *Green, supra*, 42 Cal.4th 254 for the proposition that “It is now settled that the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with reasonable accommodation.” (Directions For Use to CACI 2541, p. 1439⁵.) Nevertheless, under *Green*, even though defendant did not request an instruction that informed the jury that plaintiff had to show that he could perform the essential duties of a police officer with or without reasonable accommodation, the failure to do so or to object to the omission of such an instruction, did not waive the right to the instruction because it is incumbent on the trial court to instruct the jury on all vital issues in the case. (*Green, supra*, 42 Cal.4th at p. 266.)

⁵ The trial was in 2007. *Green, supra*, 42 Cal.4th 254 was decided after the trial. The 2007 CACI Directions for Use that preceded *Green*, stated there was a “divergence of authority” on the matter and noted that the Supreme Court had granted review in *Green*. (2 CACI (2007 ed.) p. 138.) Defendant raised the effect of *Green* in its motion for new trial.

Plaintiff attempts to distinguish *Green, supra*, 42 Cal.4th 254, on the ground that *Green* concerned an action for disability discrimination under subdivision (a) of section 12940, whereas his action is for the failure to reasonably accommodate him under subdivision (m). The attempt is unavailing. Although plaintiff's complaint lists the failure to accommodate him among the various alleged wrongs, and the trial court instructed the jury with "Special Instruction in lieu of CACI 2541 (Reasonable Accommodation)," plaintiff's complaint alleges a cause of action for "Disability Discrimination" in violation of section 12940, subdivision (a), and not a separate and distinct cause of action for failure to accommodate under section 12940, subdivision (m)⁶.

Moreover, even if plaintiff's complaint were construed as asserting a cause of action for failure to accommodate under subdivision (m) of section 12940, a claim for failure to reasonably accommodate under subdivision (m), like a claim for discrimination under subdivision (a), requires a plaintiff to demonstrate that he or she was "a qualified individual." (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 256 [for purposes of a failure to accommodate claim under former subdivision (k) of section 12940, predecessor to subdivision (m), the plaintiff must prove that he or she is "a qualified individual" "by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position"]; but see *Bagatti v. Department of Rehabilitation, supra*, 97 Cal.App.4th at p. 361 [subdivision (m) of section 12940 "does not require that reasonable accommodation for disability be made only where the person is 'a qualified individual' able to perform the essential functions of the job"].)

Under *Green, supra*, 42 Cal.4th 254, the trial court's failure to instruct the jury that plaintiff had to prove that he was able to perform the essential duties of a police

⁶ "Subdivision (m) . . . defines a separate and distinct unfair employment practice [failure to accommodate] independent of subdivision (a)." (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 361.)

officer was prejudicial, entitling defendant to “a new trial, with proper instructions, unless the evidence shows as a matter of law that plaintiff cannot meet his burden.” (*Id.* at pp. 266-267.) The Supreme Court basically said that the failure to instruct the jury on this element is prejudicial. Moreover, after the decision on the in limine motions, the trial court, and the parties viewed the trial as being on damages. Comments by defendant as to what remained to be tried can be viewed in that context. Thus, there was, in effect, no trial on liability. As noted, defendant did argue that an issue was whether plaintiff could perform his duties. And in its motion for new trial, defendant cited *Green* for the proposition that there was instructional error.

Plaintiff argues that the evidence that showed defendant allowed plaintiff to return to work in May 2007, demonstrates that he was able to perform the essential duties of a police officer with or without reasonable accommodation. Such evidence would be relevant to plaintiff’s ability to the essential duties in May 2007, and might be relevant to his ability to perform those duties when he returned to work on May 27, 2003, and was sent home on June 4, 2003. It remains, however, that the jury was never instructed on, and never decided whether, plaintiff was able to perform the essential duties of a police officer with or without a reasonable accommodation.

Because defendant’s challenge on appeal concerns the issue of liability and not damages, retrial will be limited to the issue of liability including whether plaintiff was able to perform the essential duties of a police officer with or without reasonable accommodations. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776 [“It is a firmly established principle of law that ‘[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.’ [Citation.]”]; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.) If the jury finds liability against defendant, then the trial court shall reinstate the award of \$1,571,500.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for retrial in a manner consistent with this opinion. No costs are awarded.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.